



BANKING STAKEHOLDER GROUP

CONSULTATION ON EBA/JC/2015/061 ON
“GUIDELINES ON THE CHARACTERISTICS OF A RISK-BASED
APPROACH TO ANTI-MONEY LAUNDERING AND TERRORIST
FINANCING SUPERVISION AND THE STEPS TO BE TAKEN WHEN
CONSIDERING SUPERVISION ON A RISK SENSITIVE BASIS”

General Comments and Replies to Questions

BY THE EBA BANKING STAKEHOLDER GROUP

London, 21st January, 2016

Foreword

The Joint Committee of the three European Supervisory Authorities (EBA, EIOPA and ESMA) has issued two Consultation Papers on money laundering and countering the financing of terrorism (AML/CFT) Guidelines. These Guidelines are designed to promote a common understanding of the risk-based approach to AML/AFT and set out how they should be applied by credit and financial institutions and competent authorities across the EU. The Guidelines are based on mandates in Articles 17, 18(4), and 48(10) of Directive (EU)2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.

The EBA Banking Stakeholder Group (BSG) welcomes the opportunity to comment on the Joint Committee Consultation Paper (EBA/JC/2015/061).

This response has been prepared on the basis of comments circulated and shared among the BSG members.

Joint Consultation Paper EBA/JC/2015/061

Joint Guidelines under Article 17 and 18(4) of Directive (EU) 2015/849 on simplified and enhanced customer due diligence and the factors credit and financial institutions should consider when assessing the money laundering and terrorist financing risk associated with individual business relationships and occasional transactions.

The Consultation Paper on the Risk-Factors Guidelines is addressed to both credit and financial institutions and competent authorities responsible for supervising compliance with AML/CFT obligations. It is designed to provide guidance on the factors that credit and financial institutions should consider when assessing the risk of money laundering and terrorist financing associated with individual business relationships and on how they should adjust their customer due diligence measures as a result of that risk assessment. The aim of the Guidelines is to provide credit and financial institutions with the tools they need to make informed, risk-based and proportionate decisions on the effective management of individual business relationships and occasional transactions. They are also designed to help competent authorities assess whether the ML/TF risk assessment and management systems and controls of EU credit and financial institutions are adequate.

Replies to Questions

- a. Do you consider that these guidelines are conducive to firms adopting risk-based, proportionate and effective AML/CFT policies

and procedures in line with the requirements set out in Directive (EU) 2015/849?

This guidance is to some extent conducive to adopting a risk based approach in line with the requirements of Directive 2015/849 and will allow firms to conduct KYC procedures that are risk sensitive. However, in parts the guidance does not seem to be risk-sensitive, such as when calling for various information to be collected on beneficial ownership (e.g. profession or source of wealth) without any regard as to the potential riskiness of the beneficial owner.

Is it correct that this implies more measures than derived from the previous Directive? Directive 2015/849 only states that institutions shall ascertain that there is indeed a lower degree of risk, and sufficient monitoring of transactions and business relationships should take place. The Joint Guidelines seem to indicate that, for example, (risk based) verification of the ultimate beneficial owner (UBO) and the source of funds should take place, but could be carried out in a different (simpler) way.

It would be beneficial to have more guidance around the requirement to determine the source of funds of ultimate beneficial owners (UBOs) with PEP status, especially in those cases where the UBO is not closely involved with the client (i.e. how to determine in such cases in what way the UBO's funds are used in the business relationship with the client).

In the context of identifying risk associated with countries and geographic areas, it is not clear what is meant under c) with 'the jurisdiction to which the customer or beneficial owner has relevant personal links' Clarification is needed.

Under chapter 2, firms' non-face-to-face business is generally assumed to be high risk, which needs to be considered very carefully in light of the European Commission's digital agenda as well as the development of better and more secure e-IDs, which should allow this business to be viewed less and less as high risk.

Also, the last paragraphs of the paper leave the question open as to how the proposed guidelines relate to other guidance issued by internationally reputable organisations, which sometimes contain more in-depth guidance on specific situations (e.g. FATF, Wolfsberg, Joint Money Laundering Steering Group). These are commonly used by (internationally oriented) financial institutions in shaping their customer due diligence (CDD) requirements for specific situations, such as trade finance.

What is the consequence for firms under supervision of those competent authorities that do not comply with these Joint Guidelines? In other words, if a competent authority does not comply with the Joint Guidelines, what effect does this have or relate to firms under its supervision that do follow this guidance?

- b. Do you consider that these guidelines are conducive to competent authorities effectively monitoring firms' compliance with applicable AML/CFT requirements in relation to individual risk assessments and the application of both simplified and enhanced customer due diligence measures?

These Guidelines could support competent authorities, although they are quite generic (which is to an extent unavoidable in order to be able to apply them to all Member States/competent authorities), but a remaining question which has not specifically been addressed in this paper relates to any additional specific guidance issued by local regulators. This is especially relevant for those authorities who decide not to follow these guidelines.

In some areas a lack of detail does mean that there will be questions of application that have not been sufficiently addressed, such as the lack of clarity around the expectations of enhanced due diligence (and the extent to which a risk based assessment (RBA) can be applied the enhanced due diligence) in regard to in particular domestic PEPs, their family members and close associates, and to correspondent banking (and in particular for activities that fall under the definition of correspondent banking, but in reality are lower risk).

It would be beneficial to further explain what kind of CDD is conducted on correspondent banking relationships within trade finance. More specifically, the difference between the role of advising and confirming bank and what the consequence is from a due diligence perspective (referring to FATF/ Wolfsberg/ Joint Money Laundering Steering Group).

It would be beneficial to provide more guidance on the consequences from a CDD perspective for correspondent banking activities, which are considered to pose a lower risk, such as those relationships limited to SWIFT RME plus capability.

Paragraph 211 (p. 79) states “.....examples of SDD measures that firms may apply include using the source of funds or destination of funds to meet some of the CDD requirements.” This may cause confusion, as Directive 2015/ 849 does not include (yet) the minimum standards for the simplified due diligence regime

- c. The guidelines in Title III of this consultation paper are organised by types of business. Respondents to this consultation paper are invited to express their views on whether such an approach gives sufficient clarity on the scope of application of the AMLD to the various entities subject to its requirements or whether it would be preferable to follow a legally-driven classification of the various sectors; for example, for the asset management sector, this would mean referring to entities covered by Directive 2009/65/EC and Directive 2011/61/EU and for the individual portfolio management or investment advice activities, or entities providing other

investment services or activities, to entities covered by Directive 2014/65/EU.

Even if the legally-driven classification would normally be the preferred classification for compliance purposes, in this context the proposed approach makes sense as not all the suggested sectors are covered by a specific directive, as is for example the case for trade finance activities.

Submitted on behalf of the EBA Banking Stakeholder Group

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